IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ORLANDO BONILLA	**:**	**CIVIL ACTION**
vs.	**:**	
DONALD T. VAUGHN, Superintendent S.C.I. Graterford; MARTIN T. HORN, Commissioner Commonwealth of Pennsylvania Department of Corrections; and WILLIAM F. WARD, Chairman Commonwealth of Pennsylvania Board of Probation and Parole	**:**	**NO. 97-7440**

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 14th day of August, 1998, upon consideration of the Petition for Writ of Habeas Corpus, filed *pro se* by Petitioner Orlando Bonilla (Document No.1, filed December 9, 1997), Respondent's Answer (Document No. 8, filed February 23, 1998), and accompanying Memorandum of Law (Document No. 9, filed February 23, 1998), Magistrate Judge Arnold Rapoport's Report and Recommendation (Document No. 11, filed March 20, 1998), Petitioner's Memorandum of Law (Document No. 12, filed March 26, 1998), Petitioner's Objections to the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport (Document No. 14, filed March 31, 1998), petitioner's Motion for Reconsideration of Court Order Dated April 8, 1998, Issued by the Honorable Jan E. Dubois, Judge (Document No. 17, filed April 13, 1998), petitioner's Amended Motion for Reconsideration of Court Order Dated April 8, 1998 (Document No. 22 filed May 13, 1998), Respondent's Memorandum in Response to Petitioner's Motion for Reconsideration (Document No. 23 filed May 28, 1998), and

Petitioner's Memorandum of Law in Support of His 28 U.S.C.§ 2241(c)(3) Writ of Habeas Corpus (Document No. 25 filed June 24, 1998), for the reasons set forth in the accompanying Memorandum, **IT IS ORDERED** that:

1. The Amended Motion for Reconsideration of Court Order Dated April 8, is **GRANTED** and the Order of April 8, 1998 is **VACATED**;

2. The Petition for Writ of Habeas Corpus, filed under 28 U.S.C. § 2241 and treated as filed pursuant to 28 U.S.C. § 2254, is **DENIED** .

3. Petitioner has not made a substantial showing of the denial of a constitutional right, and a certificate of appealability will not therefor be issued.

MEMORANDUM

I. BACKGROUND

Petitioner is an inmate at the State Correctional Institution at Graterford, Pennsylvania. He was charged with involuntary deviate sexual intercourse in the Court of Common Pleas of Lehigh County, and pled nolo contendere. He was sentenced to ten to twenty years imprisonment on May 29, 1986. Petitioner was first eligible for parole on May 29, 1996; his maximum term will expire on May 29, 2006.

On August 21, 1996, the Pennsylvania Board of Probation and Parole ("Board") reviewed petitioner's file and denied parole on September 9, 1996. The Board listed as its reasons for denial of parole:

1. substance abuse
2. assaultive instant offense,
3. very high assaultive behavior potential,
4. victim injury,
5. your [petitioner's] need for counseling and treatment.

(Answer, attachment 5). Petitioner was scheduled for Board review again in July 1998. The

Court has not been advised on the status of that review.

On December 9, 1997, petitioner filed his initial Petition for Writ of Habeas Corpus seeking federal habeas relief on the following grounds:

1. The Parole Board may not deny parole by considering an erroneous description of the conduct underlying the offense nor use department criteria's [sic] which are constitutionally impermissible, ambiguous, arbitrary or capricious procedures as specific reasons to grant, or deny parole on definit [sic] imposed sentences.
2. The criteria which the respondents use are unconstitutional; and
3. The existing procedures employed by the respondents are arbitrary and capricious, applying erroneous descriptions of the conduct underlying the offense.

(Pet. Writ Habeas Corpus at 2, 3)

Petitioner filed a Motion for Enlargement of Time to File His Memorandum of Law in Support of His Writ of Habeas Corpus on March 19, 1998. United States Magistrate Judge Arnold C. Rapoport filed his Report and Recommendation with the Court on March 20, 1998, before he received petitioner's Motion for Enlargement of Time. That Report recommended that the Petition for Writ of Habeas Corpus be denied and dismissed for failure to exhaust state remedies pursuant to the rule in Picard v. Connor, 404 U.S. 270, 271 (1975).

Before this Court could rule on Petitioner's Motion for Enlargement of Time, it received, on March 30, 1998, Petitioner's Memorandum of Law in support of the Petition for Writ of Habeas Corpus. The Court, in its Order dated March 30, 1998, treated the Motion for Enlargement of Time to File a Memorandum in Support of Writ of Habeas Corpus as a Motion for Extension of Time to File Objections and granted petitioner until April 20, 1998, to file Objections to the Report and Recommendation of the Magistrate Judge.

By letter dated April 3, 1998, petitioner reported to the Court "that it would be a waste of

this Honorable Court's time for me to file any further responses and [I] therefore respectfully decline the opportunity to file any further motions or objections." Continuing, the petitioner asked the Court to rule on the Petition for Writ of Habeas Corpus based on the documents previously provided to the Court. At the time of his letter, petitioner had filed Objections with the Court (Document No. 14, filed March 31, 1998). However, the Objections were sent to Magistrate Judge Rapoport and were not received by this Court until April 16th, after it had issued its Order of April 8, 1998.

In its Order of April 8, 1998 the Court approved and adopted the report of the Magistrate Judge based upon consideration of, *inter alia*: the Petition for Writ of Habeas Corpus filed by Orlando Bonilla (Document No. 1 filed December 9, 1998), Petitioner's Memorandum of Law (Document No. 12, filed March 26, 1998), and United States Magistrate Judge Arnold C. Rapoport's Report and Recommendation (Document No. 11, filed March 20, 1998), and dismissed without prejudice the Petition of Orlando Bonilla for a Writ of Habeas Corpus for failure to exhaust state remedies. The Court also found that Orlando Bonilla had not made a substantial showing of the denial of any constitutional right, and declined to issue a certificate of appealability.

On April 13, 1998, petitioner filed a Motion for Reconsideration of Court Order Dated April 8, 1998 Issued by the Honorable Jan E. Dubois, Judge.[1] Petitioner filed an Amended Motion on May 13, 1998. Petitioner's arguments for reconsideration are:

1. The exhaustion of state remedies requirement did not apply in his case because there are no adequate remedies at law for an inmate in the state

[1] The petitioner also filed a Motion to Proceed on Appeal in Forma Pauperis (Document No. 20, filed April 27, 1998).

courts to allege that his parole denial violated his constitutional rights; and

2. His claim was properly filed under 28 U.S.C. § 2241(3)(c), which does not have an exhaustion requirement.

II. RECONSIDERATION

A. Standard: Although the plaintiff does not assert the procedural rule upon which he seeks reconsideration, because he filed his Motion for Reconsideration on April 13, 1998, within ten days of entry of judgment of the Court's Order dated April 8, 1998, the Court will treat his Motion for Reconsideration as one filed pursuant to Federal Rule of Civil Procedure 59(e). The standard for granting a Motion to Alter or Amend Judgment under this rule is high. "A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of," Waye v. First Citizen's Nat's Bank, 846 F. Supp. 310, 314 n.3 (M.D. Pa.), aff'd 31 F.3d 1175 (3d Cir. 1994), or as an attempt to relitigate "a point of disagreement between the Court and the litigant." Id. The Motion may only be granted if "(1) there has been an intervening change in controlling law; (2) new evidence, which was not available, has become available; or (3) it is necessary to correct a clear error of law or prevent a manifest injustice." Burger v. Mays, No. 96-4365, 1997 WL 611582, *2 (E.D. Pa. Sept. 23, 1997). See also Harsco v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied 476 U.S. 1171 (1986).

Plaintiff contends that this Court erred in applying an exhaustion requirement to his Petition for Writ of Habeas Corpus. The first issue the Court must address is whether petitioner's remedies in state court would be futile, thereby rendering the exhaustion requirement inapplicable to his Petition. The Court must also examine petitioner's claim that his Petition was properly filed under 28 U.S.C. § 2241, which does not have an exhaustion requirement.

B. Exhaustion: A claim which has not been pursued in all available state court proceedings has not been exhausted. In its Order of April 8, 1998, the Court dismissed petitioner's habeas corpus claim due to failure to exhaust state remedies. Exhaustion "serves the interests of comity between the federal and state systems by allowing the state an initial opportunity to determine and correct any violations of a prisoner's federal rights." Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986). It is, therefore, well settled that habeas petitions presenting unexhausted claims generally may not be granted by federal courts. See, e.g., Picard, 404 U.S. at 275.

Nonetheless, a federal court may reach the merits of unexhausted claims in at least two circumstances. In the first circumstance, "[a]n application for writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). The second circumstance exists "where no available state corrective process exists or the particular circumstances of the case render the state process ineffective to protect the petitioner's rights," Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. §§ 2254(b)(1)(B)(I) and (ii)), thus making a return to state court "futile." See also Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993) (discussing unexhausted claims which may be futile as result of state procedural bar); Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996) (same). A court may find that returning an unexhausted habeas claim to state court would be futile only if the claim is "clearly precluded from state court relief . . ." Lambert, 134 F.3d at 1517 (emphasis in original).

In the instant case, petitioner is challenging respondent's decision to deny his parole. The Third Circuit has held that an inmate "has available three potential ways of attacking denial of parole in Pennsylvania -- appeal, mandamus, or habeas corpus." Burkett v. Love, 89 F.3d 135,

142 (3d Cir. 1996). However, in reaching this conclusion, the Third Circuit noted that the state law in this area is "somewhat unsettled," and went on to invite state law clarification: "Obviously, a ruling by the state Supreme Court or Commonwealth Court discussing . . . the proper channels for bringing such claims would be helpful in this frequently litigated area of law." Id.

Since Burkett was decided, the Commonwealth Court has provided state law clarification. In Weaver v. Pennsylvania Board of Probation and Parole, 688 A.2d 766 (Pa. Commw. 1997), the Commonwealth Court expressly addressed Burkett and held that inmates have no right of appeal from parole eligibility decisions, Weaver, 688 A.2d at 775, and may not challenge a parole eligibility decision by recourse to a state writ of habeas corpus. Id. at 775 n.17. The court also ruled that:

> The only relief that [petitioner] can obtain through mandamus is [that] the proper procedures be followed and the proper law be applied by the Board in ruling on his application for parole . . . , mandamus [will] only be issued if [petitioner can] show that the Board's refusal to grant parole, *as evident solely in its decision*, was, as a matter of law, based upon an erroneous conclusion that it had the discretion to deny parole *for the reason given*.

Id. at 777 (emphasis added and footnote omitted). Thus, the Pennsylvania state courts will only consider granting a writ of mandamus if the Board makes clear in the body of its decision that the denial of parole is based on a ground which is outside the Board's discretion to consider. Examples of grounds outside the Board's discretion to consider would be an inmate's race or sex.

In this case, the grounds given for denying parole were, "Substance abuse," "Assaultive instant offense," "Very high assaultive behavior potential," "Victim injury," and "Need for counseling and treatment." None of the reasons given is outside the Board's discretion which –

because "parole is a favor which lies solely within the Board's discretion," id. at 770;see also 61 Pa.C.S.A. § 331.21 – is extremely broad. Therefore, it would be futile for petitioner in this case to seek a writ of mandamus in state court.

Under the authority of Weaver, the Court concludes that the petitioner is "clearly precluded from state court relief," Lambert, 134 F.3d at 517 (emphasis in original), and, accordingly, the exhaustion requirement does not apply. See 28 U.S.C. § 2254(b). Hence, the decision to adopt the Magistrate Judge's Report and Recommendation, and dismiss the Petition of Orlando Bonilla for a Writ of Habeas Corpus for failure to exhaust state remedies, was an error of law. For that reason, pursuant to Federal Rule of Civil Procedure 59(e), the Court will reconsider the Petition for Writ of Habeas Corpus, vacate its Order of April 8, 1998, and reach the merits of petitioner's claims.

C. Jurisdiction: Petitioner argues that habeas corpus petitions attacking parole board decisions are properly brought under 28 U.S.C. § 2241, and therefore, the exhaustion of state remedies requirement of § 2254 does not apply. For the reasons that follow, the Court concludes that § 2254, and not § 2241, applies to state prisoners contesting Board decisions.[2]

Section 2254 applies to all federal habeas claims filed by state prisoners contesting Board decisions because "comity considerations are not limited to challenges to the validity of state court convictions." Preiser v. Rodriguez, 411 U.S. 475, 491 (1973). In Preiser the Supreme

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[2] 28 U.S.C.§2241 provides in relevant part: "The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." In contrast, 28 U.S.C. § 2254 provides in relevant part:

> [A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Court held that when a state prisoner challenges the duration of his physical imprisonment, seeking speedier release from that imprisonment, his sole federal relief is to seek a writ of habeas corpus pursuant to § 2254. See id. at 500. The Supreme Court goes on to say in Preiser:

> [T]he exhaustion requirement of § 2254(b) . . . is rooted in considerations of federal-state comity . . . . That principle was defined in Younger v. Harris, 401 U.S. 37, 44 . . . (1971), as 'a proper respect for state functions,' and it has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked.

Preiser, 411 U.S. at 491.[3]

The Court concludes that § 2254 sets forth the proper procedure for any petition for writ of habeas corpus filed by a state prisoner contesting the duration of his imprisonment. See Preiser, 411 U.S. at 491 (holding that the sole remedy for a state prisoner contesting the duration of his imprisonment is a § 2254 writ of habeas corpus); Morrissey v. Brewer, 408 U.S. 471 (1972) (holding that petitioners' habeas challenge to a state administrative decision to revoke their parole was properly brought pursuant to § 2254); Story v. Collins, 920 F.2d 1247, 1250 (5th Cir. 1991) (holding that the proper remedy for a good conduct time claim is filed under § 2254); Graham v. Broglin, 922 F.2d 379, 380, 381 (7th Cir. 1991) ("If a prisoner seeks by his suit to shorten the term of his imprisonment, he . . . must . . . proceed under the habeas corpus statute

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[3] Petitioner does cite one case, George v. Vaughn, No. CIV. A. 98-3, 1998 WL 188847 (E.D. Pa. April 21, 1998), in which the court decided that a state prisoner's challenge to a denial of parole was properly filed under 28 U.S.C. § 2241. The court in that case based its reasoning on Bennett v. Soto, 850 F.2d 161 (3d Cir. 1988). However, Bennett is distinguishable because that court was discussing § 2255 claims by federal prisoners. Section 2255 covers claims by federal prisoners arising out of the imposition of a sentence, not the execution of a sentence. See United States v. Addonizio, 442 U.S. 187, 190 (1979); Bennett, 850 F.2d at 163; United States v. Ferri, 686 F.2d 147, 156 n.10 (3d Cir. 1982). In contrast, § 2254, as discussed above, applies to all habeas claims of state prisoners contesting the duration of their imprisonment. The Court also notes that in George, although stating that the claim was properly filed as a § 2241 petition, the court analyzes the claim as if it were a § 2254 petition, applying § 2254(b)(2) which allows the court to deny the claim on the merits without requiring exhaustion. See George, 1998 WL 188847 at *2.

with its requirement of exhaustion of state remedies . . . ."); James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure 249 n.34, 256 n.55 (2d ed. 1994). For the foregoing reasons, the Court concludes that the Petition for Writ of Habeas Corpus should have been, and will therefore be treated as if it had been, filed under 28 U.S.C. § 2254.

III. DISCUSSION

Petitioner has the burden of producing facts entitling him to a discharge from custody. See Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982); Betts v. Rafferty, No. Civ. A. 88-4043, 1989 WL 200949 at *1 (D.N.J. Aug. 21, 1989). The gravamen of petitioner's claims, as set forth in the Petition and amplified in Petitioner's Memorandum of Law (Document No. 22, filed March 26, 1998), are:

A. By conducting petitioner's parole review under new guidelines, the Board violated the Ex Post Facto Clause of the Constitution, and violated Pennsylvania's separation of powers;
B. Petitioner has a liberty interest in parole;
C. In disregarding its own prescriptive programs, and denying parole based on an erroneous description of the offense when evaluating petitioner, the Board's criteria and review were arbitrary and capricious in violation of petitioner's liberty interest;
D. The Board was motivated by retribution, in violation of Pennsylvania law; and
E. By requiring petitioner to complete prescriptive programs that he has already completed and benefited from, before granting him parole, the respondents violated his constitutional right to protection against double jeopardy.

A. Ex Post Facto: "A law that increases the punishment over that permitted to be imposed when the crime was committed violates the Ex Post Facto Clause." Watkins v. Horn, No. Civ. A. 96-4129, 1997 WL 266837, at *2 (E.D. Pa. May 13, 1997) (quoting Smith v. United States Parole Comm'n, 875 F.2d 1361, 1366 (9th Cir. 1988)). Petitioner claims that the decision of the

Board amounts to a re-sentencing under new law, because 64 Pa.C.S.A. § 331.1, the statute granting the Board its power, was amended in 1996 to include, inter alia, the provision, "the board shall first and foremost seek to protect the public." Petitioner also produced evidence that, in return for federal funds under Title II, Subtitle A of the Crime Act of 1984, the Board has a new goal of requiring violent offenders to serve over 85% of their maximum sentences, whereas previously, 80% of offenders were granted parole at the expiration of their minimum sentence term. See Petition for Writ of Habeas Corpus, Ex. H. Accordingly, based on that previous practice, petitioner argues that the sentencing judge anticipated petitioner would be released on parole after his minimum sentence was served.

"[P]arole guidelines [can] constitute laws within the meaning of the *ex post facto* clause." Crowell v. United States Parole Com'n, 724 F.2d 1406, 1408 (3d Cir. 1984). In Crowell, the Third Circuit stated that the test for determining if the Parole Commission's guidelines are laws, in the context of ex post facto analysis, is whether the guidelines are applied "rigidly, or with substantial flexibility . . . ." Id. If applied rigidly, or mechanically, guidelines can, in some instances, violate the ex post facto clause. Similarly, in Lynce v. Mathis, -- U.S. --, 117 S.Ct. 891 (1997), the Supreme Court held that a cancellation of good time credits, resulting in the reincarceration of a prisoner, violated the ex post facto clause. See id. at 900.
On the other hand, "'speculative and attenuated possibilities' of increasing the measure of punishment do not implicate the ex post facto clause." Id. at 897 (citing California Dept. of Corrections v. Morales, 514 U.S. 499, 510 (1995)).

"[U]nder Pennsylvania law, the sentence imposed for a criminal offense is the maximum term. The minimum term merely sets the date prior to which a prisoner may not be paroled."

Krantz v. Pennsylvania Board of Probation & Parole, 514 A.2d 1044, 1047 (Pa. Commw. Ct. 1984). In Pennsylvania, the Board has been given the power to determine a prisoner's release date under 61 Pa.C.S.A. § 331.21, and its decision is not subject to judicial review. See Weaver, 688 A.2d at 770; Tubbs v. Pennsylvania Bd. Probation & Parole, 620 A.2d 584, 86 (Pa. Commw. Ct. 1993); Reider v. Pennsylvania Bd. Probation & Parole, 514 A.2d 967, 969, 72 (Pa. Commw. ct.. 1986); Krantz, 514 A.2d at 1047.[4] The Board had the same broad power over parole decisions at the time of petitioner's conviction. See Krantz, 514 A.2d at 1047. Under Pennsylvania law, "the Board adheres to no formal guidelines in making its parole and reparole determinations," Jubilee v. Horn, 959 F. Supp. 276, 282 (E.D. Pa. 1997), and it thus cannot be said that parole guidelines are "rigidly" applied. The cases cited by petitioner are, therefore, inapposite. At most, petitioner has set forth some evidence from which it may be inferred that the Board has exercised a change in emphasis of the implementation of existing laws which change is not unconstitutional. See Jubilee, 959 F. Supp. at 282.

Changes in vigor in the application of existing laws are not new laws subject to invalidation by the ex post facto clause. See Morales, 514 U.S. at 510; Prater v. United States Parole Comm'n., 802 F.2d 948, 952, 53 (9th Cir. 1988) ("If . . . the Parole Commission takes a more jaundiced view of applications for parole, the ex post facto clause is not violated."). In petitioner's case, the Board did not subject petitioner to any new or additional sentence. It merely exercised its discretion in choosing not to release petitioner at the expiration of the minimum term under the sentence. Petitioner has produced no evidence that the sentencing judge

[4] The fact that the trial judge has no discretion to set the precise date of release does not violate petitioner's constitutional rights. See Addonizio, 442 U.S. at 189.

in his case intended that petitioner serve only the minimum term. However, assuming arguendo that such claim is true, the fact that petitioner's parole review may have been more stringent than the sentencing judge anticipated does not trigger the ex post facto clause. See Morales, 514 U.S. at 510.[5]

B. Procedural Due Process: Petitioner also claims that he has a liberty interest in parole. He asserts that when the Board required him to complete "prescriptive programs" (although he has already completed several such programs), refused parole without reviewing documentation of his participation in those programs, and based its decision in part on police reports of the original crime and the emergency room reports of his victims, they did so in violation of his liberty interests.

With respect to petitioner's assertion that by requiring him to complete prescriptive programs and basing its decision in part on police and emergency room reports, the Board denied him procedural due process, petitioner must establish the deprivation of a protected liberty or property interest before he can claim that his right to procedural due process was denied. See, e.g., Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 459, 460 (1989); Hewitt v. Helms, 459 U.S. 460, 466-71 (1983); Hayes v. Muller, No. CIV.A.96-3420, 1996 WL 583180, at *5 (E.D. Pa. Oct. 10, 1996). Although the Constitution does not create a liberty interest in the expectation of parole, see Greenholtz v. Inmates of Nebraska Penal and

[5] By the same reasoning, the Board did not usurp the powers of the judicial branch in violation of Pennsylvania's separation of powers, as petitioner claims in his Memorandum of Law. However, this is an issue of state law, and "federal habeas review does not lie for errors of state law." Lewis v. Jeffers, 497 U.S. 764, 780 (1990); see also Gilmore v. Taylor, 508 U.S. 333, 348, 49 (1993) (O'Connor, J., concurring in the judgment)("[M]ere error of state law, one that does not rise to the level of a constitutional violation, may not be corrected on federal habeas"); Estelle v. McGuire, 502 U.S. 62, 67, 68 (1991); Pulley v. Harris, 104 U.S. 37, 41 (1984). Therefore, the Court declines to address that portion of petitioner's claim.

Correctional Complex, 442 U.S. 1, 7 (1979), a state statute may create a liberty interest by creating an expectation of parole under certain circumstances. See Sandin v. Conner, 515 U.S. 472, 484 (1995) (citing Board of Pardons v. Allen, 482 U.S. 369 (1987) (holding that states could create a liberty interest in parole) with approval but holding that "these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life (citations omitted)); Hewitt 459 U.S. at 466 (1983); Hill v. Jackson, 64 F.3d 163, 170 (4th Cir. 1995);Hayes , 1996 WL 583180, at *6.

However, as the Court has stated, Pennsylvania has granted its Board of Probation and Parole broad discretion in deciding whether to grant parole. See Weaver, 688 A.2d at 770; 61 Pa.C.S.A. § 331.21. Because a decision as to parole eligibility rests solely in the discretion of the Board, inmates in Pennsylvania have no state created liberty interest in a grant of parole. See Speth, 1998 WL 272155 at *9; Nelson v. Miranda, Civ. A. No. 96-CV-2854, 1997 WL 327381 at *18 (E.D. Pa. May 6, 1997); Ramos v. Vaughn, No. Civ. A. 94-2596, 1995 WL 386573 at *14 (E.D. Pa. June 27, 1995);Weaver , 688 A.2d at 770. Because petitioner has no protected liberty interest in parole by a certain date, he has not established a violation of procedural due process.

Petitioner also argues as a second basis of his procedural due process claim that the Board has arbitrarily violated its own procedure by neglecting to review the documents attesting to his participation in prescriptive programs. However, a state's failure to follow its own procedures does not violate an individual's constitutional right to due process. See Brandywine Affiliate, NCCEA/DSEA v. Brandywine Bd. of Ed., 555 F. Supp 852, 862 (D. Del. 1983) (citing Shango

v. Jurich, 681 F.2d 1091, 1101-02 (7th Cir. 1982) ("[A] state created procedural right is not itself a liberty interest . . . . States may decide to engage in such proceedings, but the due process clause does not compel them to do so because no constitutionally cognizable substantive interest of the prisoner is at stake.")); Hayes v. Muller, No. Civ. A 96-3420, 1996 WL 583180, *7 (1997 E.D. Pa.) ("[A] state does not violate an individual's federal constitutional right to procedural due process merely by deviating from its own established procedures."). As petitioner's claim is not of a constitutional nature, it is merely a question of state law, unaddressable by this Court. See supra note 5. Therefore, the Court will not address petitioner's claim that the Board violated its own procedure.

C. Substantive due process: Even in cases in which a prisoner may not have a protected liberty interest, substantive due process protects inmates from arbitrary denials of parole based on impermissible criteria such as race, political beliefs or such frivolous factors as the color of one's eyes. See Block v. Potter, 631 F.2d 233, 236 n.2 (3d Cir. 1980). In deciding whether to grant a petition for writ of habeas corpus where denial of parole is at issue, a federal court is limited to determining whether the Board's "decision is . . . arbitrary and capricious . . . [or] based on impermissible considerations. In other words, the function of judicial review is to determine whether the Board abused its discretion . . . . When the Parole Board bases its decision on factors that bear no rational relationship to rehabilitation or deterrence, it transgresses the legitimate bounds of its discretion." Id. at 236, 37.

The Board in petitioner's case based its report on the description of the crime found in the official record, including the relevant court documents, emergency room reports, and police files. These documents go to the character of the offense committed. They are relevant to the potential

for rehabilitation and future deterrence. Therefore, the criteria used to evaluate petitioner were not erroneous, arbitrary, or capricious.

As to petitioner's claim that the Board was unaware of his participation in counseling programs, asserting that documentation regarding his participation was missing from his file, and implying that the papers were purposely misplaced by state officials, respondents assert that the Board was informed of petitioner's involvement in these programs. Petitioner has not provided any evidence to support his position on this issue. Therefore, the Court finds no due process violation on the basis of that claim.

In Pennsylvania, the Board, in exercising its discretion, is expressly directed to investigate the "mental and behavior condition and history" of a parole applicant and to consider the "character of the offense committed." 61 Pa.C.S.A. § 331.19. These criteria bear a rational relation to rehabilitation and deterrence. The reasons given by the Board for denial of parole -- (1) substance abuse, (2) assaultive instant offense, (3) very high assaultive behavior potential, (4) victim injury, and (5) your [petitioner's] need for counseling and treatment -- and the documents reviewed by the Board, disclosed that it considered those factors in exercising its discretion. The Court does not find that there has been any abuse of discretion.

D. Retaliation: Petitioner offers the nature of the documents reviewed to demonstrate that the Board was motivated by retribution in violation of Pennsylvania law. It is true that "a state may not bar parole in retaliation for a petitioner's exercise of his constitutional rights," Burkett, 89 F.d. at 140, and the Court will treat this claim as one for unconstitutional retaliation. Although petitioner implies that the Board is retaliating because of the nature of his original offense, petitioner does not directly allege a claim of retaliation in his Petition, and fails to clearly

state in his Memoranda against what the Board was retaliating. However, because he is a pro se petitioner, the Court will liberally construe his complaint to address his claim of retaliation, assuming that petitioner intended to allege Board retaliation by the first ground stated in his Petition ("The Parole Board may not deny parole by considering an erroneous description of the conduct underlying the offense . . .").

The Court reviews a petitioner's claim of retaliation only if the petitioner claims that he has been penalized in retaliation for exercise of his constitutional rights. See Swint v. Vaughn, No. Civ. A. 94-3351 1995 WL 366056 (E.D. Pa. June 19, 1995) at *5. A "reaction to an unprotected act . . . is not [constitutionally actionable]." Id. Furthermore, "[t]o maintain a claim of retaliation for the exercise of constitutional rights, the prisoner bears the burden of proving that the action would not have been taken but for the exercise of such rights." See Watkins, 1997 WL 266837 at *5 (quoting Jones v. Coughlin, 696 F. Supp. 916, 920 (S.D.N.Y. 1988)).[6]

Petitioner argued that by looking to the nature of his crime, and allegedly failing to consider his completion of prescriptive programs, the Board evidenced its intent to retaliate; these facts, however, (even if true) are not evidence of retaliation. Moreover, petitioner failed to produce any evidence that the Board was retaliating against him for the exercise of any constitutional right. Petitioner also failed to produce evidence that the alleged retaliation was a but-for cause of the denial of parole. As discussed above, the Court finds no abuse of discretion in the Board's use of the documents in question.

E. Double Jeopardy: Petitioner argues that by stating in its decision that petitioner "must

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[6] Petitioner claims that the Board's alleged retaliation violates Pennsylvania law as well, but this Court declines to address that issue. See supra note 5 and accompanying text.

participate in prescriptive program plan, including sex offender program," (Answer, Attachment 5), which petitioner has already completed, the Board violated the Double Jeopardy Clause of the Constitution. The Double Jeopardy Clause offers "complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense." Ex parte Lange, 85 U.S. 163, 168 (1874). However, the scope of the Double Jeopardy Clause is limited to criminal prosecutions. See Breed v. Jones, 421 U.S. 519, 528 (1975). As an administrative hearing, a Parole Board hearing is not "essentially criminal." See Garcia v. United States, 769 F.2d 697, 700 (11th Cir. 1985) ("[T]he Double Jeopardy Clause does not apply to parole revocation proceedings."); Priore v. Nelson, 626 F.2d 211, 217 (2d Cir. 1980) ("The Double Jeopardy Clause applies to judicial proceedings, not parole."); United States ex rel. Conklin v. Beyer, 678 F. Supp. 1109, 1111 (D.N.J. 1988); United States v. Myers, 237 F. Supp. 682, 683 (E.D. Pa. 1965). Therefore, a Parole Board may deny parole, causing a convict to serve up to his maximum sentence, without violating the Double Jeopardy Clause. See United States ex rel. Lawson v. Cavell, 425 F.2d 1350, 1352 (3d Cir. 1970); Jubilee, 959 F. Supp. at 279 n.4.

The Board in this case did not increase petitioner's sentence. Petitioner is under no obligation to participate in prescriptive programs. Should he fail to complete (or retake) the programs, petitioner will not face any greater term of imprisonment than the maximum 20 years of his original sentence. Therefore, petitioner has no basis for a double jeopardy claim.

IV. CONCLUSION

The Court finds that although the Petition for Writ of Habeas Corpus is properly filed under 28 U.S.C. § 2254, attempting to exhaust state remedies would be futile in petitioner's case.

Therefore, the Court reaches the merits of the Petition. However, petitioner has failed to show that, in refusing parole, the Board violated the ex post facto clause of the Constitution, or petitioner's rights to due process and protection from double jeopardy, or that the Board refused parole due to retaliatory motives.

For the foregoing reasons, the Court has granted Orlando Bonilla's Amended Motion for Reconsideration of Court Order Dated April 8, 1998, vacated its Order of April 8, 1998, and denied the Petition for Writ of Habeas Corpus.[7]

BY THE COURT:

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JAN E. DUBOIS

[7] Even if the Court's conclusion is erroneous and petitioner is not "clearly precluded from state court relief," the Court may nonetheless reach the merits of his claims because it is denying his Petition. See 28 U.S.C. § 2254(b)(2).

In any case, even if petitioner were forced to participate, prescriptive counseling programs do not qualify as punishment. In Kansas v. Hendricks, 117 S. Ct. 2072 (1997), the Supreme Court held that civil commitment of sex offenders at the expiration of their maximum terms is not criminal punishment, and thus does not violate the ex post fact or double jeopardy clauses. See also E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997) (holding that community notification requirements did not inflict "punishment" in violation of double jeopardy clause or ex post facto clause). In order for a commitment statute to qualify as punitive, the petitioner must "provide the clearest proof that the scheme is so punitive in purpose or effect as to negate [the State's] intention to deem it civil." Id. at 2082. The statute must "implicate [one] of the two primary objectives of criminal punishment: retribution or deterrence." It is "not retributive if it does not affix culpability for prior criminal conduct. "Instead, such conduct is used solely for evidentiary purposes, . . . to support a finding of future dangerousness." It is not a deterrent if the threat of the program alone would not be likely to deter a potential criminal from committing the crime. Id. Although the suggested programs in this case do not rise to the level of a statutory commitment, the same reasoning can be applied to these programs, which are neither retributive, nor deterrent, and therefore, are not punitive.